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# CAN THE UNITED STATES BY TREATY CONFER ON JAPANESE RESIDENTS IN CALIFORNIA THE RIGHT TO ATTEND THE PUBLIC SCHOOLS?

BY

WILLIAM DRAPER LEWIS

*Dean Law Department, University of Pennsylvania*

*REPRINTED FROM THE AMERICAN LAW REGISTER FOR FEBRUARY, 1907, VOL. 55, NO. 2.*

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1907




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# CAN THE UNITED STATES BY TREATY CONFER ON JAPANESE RESIDENTS IN CALIFORNIA THE RIGHT TO ATTEND THE PUBLIC SCHOOLS?

The action of the School Board in San Francisco in requiring the Japanese residents of that city, who desire to educate their children in the public schools, to send them to the separate school provided by the authorities for the education of the children of Mongolian parents, raises an interesting question of the proper interpretation of the rights conferred upon Japanese residents by our Treaty with Japan. The action may also raise the question of the extent of the treaty-making power conferred by the Constitution on the Federal Government.

The first Article of our Treaty of Commerce and Navigation with Japan, the treaty of 1894, provides:

"The citizens or subjects of each of the two high contracting parties shall have full liberty to enter, travel or reside in any part of the territories of the other contracting party. * *

"In whatever relates to rights of residence and travel * * * the citizens or subjects of each contracting party shall enjoy in the territories of the other the same privileges, liberties and rights, and shall be subject to no higher imposts or charges in these respects than native citizens or subjects or citizens or subjects of the most favored nation."

The last clause of the second Article is as follows:

"It is, however, understood, that the stipulations contained in this and the preceding Article do not in any way affect the laws, ordinances and regulations with regard to * * * police and public security which are in force or which may hereafter be enacted in either of the two countries."

In regard to the proper construction of this Treaty as applied to the action of the San Francisco School Board, several questions arise.

Is the right of the inhabitants of San Francisco to have their children attend the public schools a right of "residence" within the meaning of that word as used in the Treaty?

Does the San Francisco School Board deny to Japanese

residents the same "privileges, liberties and rights" of public school education, as it gives to her own citizens or the citizens of other countries, being residents of San Francisco, by requiring Japanese residents to send their children to a separate school?

This question may be affected by the location of and accommodation in the separate Mongolian school of San Francisco. We understand that there is but one Mongolian public school in the city.

If it should be decided that, within the meaning of the Treaty, a right to attend a public school is a right of residence, and that the action of the San Francisco School Board is a denial of "the same privileges, liberties and rights" in respect to public school education which are granted to other residents, the question would remain, whether the act of the San Francisco authorities could be justified under the clause which excepts "laws, ordinances and regulations with regard to police and public security."

It appears to the writer that the main questions relating to the proper interpretation of the Treaty are the first two as stated.

Should the courts decide that the action of the School Board did violate the true intent and meaning of the Treaty, they would be confronted with the further question: Is the Treaty constitutional? If the treaty-making power of the Federal Government is limited, and if this Treaty in conferring on Japanese residents in the United States the right to attend the public schools of a State exceeds those limits, the Treaty in this respect is unconstitutional, and no more the supreme law of the land than an unconstitutional act of Congress. The question, "Can a Treaty override the Constitution?" is to-day as absurd as the question, "Can an Act of Congress override the Constitution?" The treaty-making power, as the legislative power, must be exercised within those limits, if any, imposed by the Constitution.

The difficulty is to determine the extent of the treaty-making power. Is it an unlimited power or is it a limited power; and, if limited, what are the limitations? On

the answers given to these questions depends the validity of the Japanese Treaty, supposing that that Treaty does in terms give the right to Japanese residents in this country to send their children to the public schools of the State in which they reside,

The discussion of the extent of the treaty-making power is almost wholly an academic one, the Supreme Court having only decided one point; namely, that the treaty-making power of our Federal Government is not confined within the limits of the legislative power of that government. That can be done by treaty which cannot be done by act of Congress.

Thus Chief Justice Marshall, in *Chirac* v. *Chirac*, assumed that a treaty regulating the rights of foreigners to inherit, purchase and hold lands in Maryland, was constitutional, and superseded any Act of the State conflicting therewith. Indeed, the constitutionality of the Treaty was not questioned by council or court, the argument and opinion being confined to its proper construction. The same assumption had already been made by Story. The case itself was several times confirmed during the time of Marshall,[1] while it has been expressly followed in more recent years. That an Act of Congress could not regulate the right of foreigners to purchase and hold land in a State is beyond controversy. The widest possible extension of the power of Congress "to regulate commerce with foreign nations" would not give to that body the power to pass such a law.

The conclusion reached from the cases referred to, that under the treaty-making power that can be done which Congress under its legislative power cannot do, is still further strengthened by the long acquiescence of all

[1]The opinion of Judge Story is that given by him in *Fairfax* v. *Hunter's lessee*, 7 Cranch's Reports, 603 (1813); *Chirac* v. *Chirac* is reported in 2 Wheaton's Reports, 259 (1817). The other cases affirming *Chirac* v. *Chirac* in Marshall's time are *Orr* v. *Hodgson*, 4 Wheaton's Reports, 453 (1819); *Hughes* v. *Edwards*, 9 *ib.* 489, 496 (1824); and *Carneal* v. *Banks*, 10 *ib.* 181 (1825). The more modern case confirming these cases is *Hauenstein* v. *Lynham*, 100 United States Reports, 483 (1879). See also opinion of Mr. Justice Field in *Geofroy* v. *Riggs*, 133 *ib.* 258, at page 266.

Departments of the Federal Government, and of the states, in extradition treaties; treaties in which claims of our citizens against foreign governments have been confiscated, barred and satisfied; trade-mark conventions; and treaties giving foreign consuls judicial powers in the United States, or United States consuls judicial power over American citizens in foreign lands. In all these treaties will be found provisions which Congress alone, under its legislative power, could not enact.[2]

On the other hand no member of the Supreme Court, text writer, or publicist has yet taken the position that the treaty-making power of our Federal Government is absolutely unlimited.

The three main Articles of the Constitution deal respectively with the legislative, executive and judicial departments. The clause conferring treaty-making power is in the second Article. This Article provides that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur." The Constitution does not specify the subjects in regard to which treaties may be made. The words are general; the President and the Senate have the power to make treaties. There is a marked difference in this respect in the manner in which the second Article confers the treaty-making power and the way in which the first Article confers the power of legislation. The first Article, after providing for the creation of a legislative body, confers on that body, not the power to legislate, but the power to legislate on particular subjects which are carefully enumerated.

The powers conferred by the first Article are on their face legislative powers only. They neither purport to give nor take away any power which the President and the Senate may possess in respect to treaties. This fact is the justification for the decisions of the Supreme Court to which reference has been made. Shortly after the Constitution was adopted, when the Jay Treaty with England was under discussion, it was supposed by some

[2]Butler, Treaty-making Power, chapter ix.

that as the first Article conferred on Congress the power to regulate foreign commerce, under the treaty-making power no commercial treaty could be negotiated. It was soon perceived, however, that regulations of foreign commerce could be the result either of an act or a treaty, and that while the first article had conferred on Congress legislative power which enabled them to regulate foreign commerce, that did not prevent the treaty-making power from being so exercised as to produce the same result. Since then the proposition that the treaty-making power of our Federal Government is neither enlarged or contracted by the grants of legislative power in the first Article has never been seriously questioned. Taking these first two Articles of the Constitution by themselves, it is as clear that general treaty-making power is conferred in the second Article, as it is that limited legislative power is conferred in the first Article. If it be objected that the Constitution does not in express terms give to the Federal Government power to make any treaty it sees fit, it can be replied, that where those who are sovereigns confer on their agents one of the great powers of sovereignty, as the power of legislation or the power to make a treaty, the word "all" is not necessary to explain the extent of the power. The power to do something given by a sovereign hand is the power to do it in any way the grantee sees fit. The argument that because the word "all" does not precede the word "power" in the clause conferring treaty-making power and that therefore the power is limited, proves too much. It would show that the words in the second Article do not confer a power to make a treaty on any subject. Not only is the word "all" not used, but none of the subjects on which treaties may be negotiated are referred to.

As in apparently unambiguous language full and unlimited treaty-making power is by the second Article conferred on the President and the Senate, the burden is on those who contend that the power is limited to prove their case. For we must remember that if the Constitution does attempt to give to the President and Senate

an unlimited power to make treaties, the attempt has been successful. There have been two theories in regard to the adoption of the Constitution of the United States; one that it was adopted by the people of the United States; another that it was adopted by the states. The advocates of either theory, however, agree that the power which adopted the Constitution was competent to confer on the government created by the Constitution all the powers of sovereignty. The source from which the Constitution sprang is a source of unlimited power and authority. The people or the states who adopted it could give to the new government that they created just as much or just as little of the powers of sovereignty as they chose.

Limitations on the treaty-making power, if any exist, may be found, either in the nature of the power, or the words of the Constitution. Again, limitations may possibly be implied from the fact that our Constitution was adopted by a free people, or may be implied from the very existence of the states as an intregal part of our Federal State.

A moment's consideration will show that there is nothing in the nature of the power which limits its operations to particular classes of subjects. A treaty is a contract between two nations. Treaties, if not essential to foreign social and commercial intercourse, are at least an important means of fostering such intercourse. The people of a nation regulate their conduct towards each other by those customs to which they have given the force of law, and by legislation; but much of their conduct towards the people of another nation must be regulated by treaty. Thus, the binding rules of conduct of any people spring from three sources, custom, legislation, and treaties. There is nothing in the nature of any of these sources of law which prevents any particular law from having its origin in any one of them. The wisdom of the contract expressed in the treaty is for the sovereign nations who are parties to it to consider. Being sovereign, the power to contract knows no legal limits. If, there-

fore, full and unlimited treaty-making power is given to the Federal Government, by treaty anything can be done. There is nothing in the nature of the power to limit the subjects on which treaties can be made.

Though the treaty-making power is not limited by the nature of the power, it is limited by the words of the Constitution.

The Constitution creates a government with three Departments, the legislative, executive, and judicial, and provides to a great extent for their organization. It confers on each certain powers. It would seem almost an axiom of Constitutional Law that no one of the powers conferred can be so exercised as to alter the Constitution. "A power given by the Constitution," says Judge Story, "cannot be construed to authorize a destruction of other powers given by the same instrument. * * * A treaty to change the organization of the government or annihilate its sovereignty, to overturn its republican form or to deprive it of its constitutional powers, would be void, because it would destroy what it was designed to fulfill, the will of the people."[3] The treaty-making power, as all other powers of our Federal Government, is necessarily limited to the extent here indicated. By treaty we may not alter the Constitutional distribution of powers between the three Departments of our Federal Government, or confer on any Department a power not conferred on it by the Constitution. By treaty we may not agree that hereafter Congress should legislate on divorce, or that the treaty-making power itself should be executed by Congress; or that a particular State should have three representatives in the Senate.

If a treaty cannot alter the Constitution as written, a treaty cannot violate any specific general restriction on federal power which may be found in the Constitution. The first eight Amendments, for instance, are prohibitions against specific exercises of power. In all except the first, the prohibition is in terms general. The second Amendment does not say that "Congress shall not pass any law," forbidding the people to bear arms,

[3] Story on the Constitution, section 1508.

or that "the executive shall not interfere with this right," but that "the right of the people to keep and bear arms shall not be infringed." A treaty which deprived the people of this right would be apparently in direct violation of the express words of the Constitution.

It is, however, important to note that the 10th Amendment does not limit the treaty-making power. This Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." But the power to make treaties is expressly given to the United States by the Constitution, and the Constitution also expressly prohibits the States from exercising the treaty-making power. The power to make treaties, therefore, is not one of the powers "reserved to the States respectively, or to the people," mentioned in this Amendment.

Again, it is important to note that the principle that a treaty cannot alter the Constitution as written, cannot be extended to prohibit treaties dealing with subjects not referred to in the Constitution. It may be that there are limitations on the treaty-making power, arising out of the fact that the Constitution was adopted by a free people, or from the very existence of the states as a necessary part of the Federal system. But such limitations, if they exist, do not come from the words of the Constitution. For instance, it is admitted that a treaty which conferred on Congress the right to regulate marriage and divorce would be unconstitutional. But whether the marriage of aliens in the United States could be regulated by treaty is a radically different question. If the treaty-making power cannot deal with the subject of the marriage of aliens in the United States, it is not because of anything expressed in our Constitution. The Constitution confers on Congress legislative power over certain subjects. The marriage and divorce of natives or aliens in a State of the United States is not a subject on which Congress has been given power to legislate. To confer such power on Congress by treaty would alter the Consti-

tution as written. But to regulate divorce by treaty does not alter the Constitution as written. As has been pointed out, the Constitution gives to the President and the Senate the power to make treaties. It does not say that the marriage and divorce of aliens in the United States shall not be regulated by treaty. There is no clause in the Constitution which such a treaty would violate. To say that we have not given the power to legislate on divorce to Congress and therefore that it may be presumed that it was not intended to confer on the President and Senate the power to regulate the subject by treaty, is to take the position that the grants of legislative power limit the treaty-making power; a position which has been, as we have seen, expressly repudiated by the Supreme Court. If, therefore, there is no power to make a treaty on the subject, the want of power must be due, not to anything expressed in the Constitution, but to some implied limitation on the treaty-making power.

The principles on which we would have to test the validity of a treaty on the marriage and divorce of aliens in the United States, also applies to the Treaty under discussion. Admitting that our Treaty with Japan provides that Japanese residents shall have a right to attend the public schools of a State, it is evident that such treaty does not violate any clause of the Constitution as written. Such a treaty does not confer on Congress legislative power over the state schools. It does not increase or decrease legislative or executive power as found in the Constitution or violate any of its express prohibitions. The right of the Federal Government to adopt a treaty of the character indicated, can only be denied by showing that such a treaty violates an implied limitation on the treaty-making power.

The people of the United States are organized in a Federal State. An implied limitation on a power delegated to the Federal Government must arise out of the existence of some implied reserved right in the people of the United States, or out of the existence of some implied reserved right in the states considered as corporate entities.

We may first ask: Are there any implied reserved rights of the people of the United States not mentioned in the Constitution? Our Constitution was adopted by a free people and was intended for their government. The first eight Amendments specify certain rights of the people of the United States. The rights specified tend to protect individual liberty and the republican form of government. Following these Amendments the 9th Amendment provides: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The wording of this Amendment presupposed the existence of reserved rights in the people of the United States not mentioned in the Constitution. There are, therefore, implied limitations on the treaty-making power and on every other power of the Federal Government arising out of the fact that the Constitution was adopted by a free people imbued with the importance of individual liberty and firmly believing in democratic institutions. It is unnecessary to discuss specific illustrations of possible violations of these implied limitations on the treaty-making power, for a treaty which gives to aliens the right to attend the public schools of a State does not violate any possible rule of law designed to protect the liberty of the citizens of the United States or the republican form of government.[4]

If the Treaty under discussion does not violate any part of the Constitution as written, or any implied limi-

[4]Mr. Justice White in his concurring opinion in *Downs* v. *Bidwell*, 182 United States Reports, 244 (1900), makes an elaborate investigation of implied limitations on the treaty-making power arising from the implied reserved rights of the citizens of the United States. In the course of his interesting opinion he points out that, at the adoption of the Constitution the United States consisted of a definite number of persons inhabiting a definite territory, all of which territory was not included in the territory belonging to the original thirteen states. From this fact, coupled with the free character of our institutions, be believes that the Federal Government is impliedly restrained from parting with an inch of the territory of the United States which was part of the United States at the adoption of the Constitution or which has since been incorporated into the United States, irrespective of whether such territory is or is not part of a State. He also believes that while territory, and the people inhabiting it, can be

tation on the treaty-making power arising out of the implied reserved rights of the citizens of the United States, the single question remains: Does it violate any implied limitation on the treaty-making power arising out of implied reserved rights of the States?

If the treaty-making power is necessarily limited by the nature of a Federal State, then it will be necessary to go outside the Constitution to ascertain the nature of those limitations, and whether they prohibit the Central Government from making the treaty in question. On the other hand if there is nothing in the nature of a Federal State, in which the Central Government has all the treaty-making power, to impose implied restrictions on the subjects which may be dealt with under that power, such an investigation will be unnecessary.

The broad question whether any limitations on the treaty-making power arise of necessity from the Federal nature of our State has never been thoroughly discussed. But the most important single question which tests the question of the existence of such a limitation, the right of our Federal Government by treaty to cede the territory of a State without its consent, has been the subject of many positive and conflicting assertions. Chancellor Kent in his Commentaries; Justice McLean in *Lattimore* v. *Poteet*, and Mr. Butler in his work on the Treaty-Making Power, are all of the opinion that such a power exists. On the other hand, Woolsey in his work on In-

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acquired by the United States by treaty, the treaty-making power cannot be so used as to incorporate the acquired territory into the United States, or make the inhabitants of such territory citizens of the United States. If such incorporation of territory or naturalization of citizens is to take place, the implied or express consent of Congress must be obtained.

From this opinion two things are clear. First, the absence of power in the Federal Government to cede any territory of the United States is not ascribed by Mr. Justice White to the fact that we are a Federal State. The same limitation on the power of our national government would exist had we never had separate states, but as one people had created a national government by the adoption of the Constitution. Second, that there is nothing in Mr. Justice White's opinion inconsistent with the power of the Federal Government by treaty to confer on Japanese residents the right to attend the public schools of a state. Such treaty does not make the Japanese citizens or confer on them political rights, or incorporate territory into the United States.

ternational Law, and the late Justice Field of the Supreme Court, deny the power.[5]

The greater power includes the less. If it can be shown that there is nothing in the nature of a Federal State to prevent the treaty-making power from ceding part or all of the territory of a State to a foreign power, there is certainly nothing in the nature of such a State to prevent the subjects of a foreign power from being given by treaty the right to attend the public schools of the State. In the second case a State is merely required to devote a part of its property, set aside for the education of native residents, to the education of foreign residents; but in the first the State itself is destroyed.

The sole force which creates confederacies is usually pressure from abroad. The separate states realize that as independent units they cannot continue to exist. A

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[5]The authorities spoken of in the text, as in favor of the power are: Kent's Commentaries, vol. 1, 167, note b; *Lattimore* v. *Poteet*, 14 Peter's Reports, 4 (1840), at pages 13, 14; Butler's Treaty-Making Power in the United States, Chapter XVI. Those given as opposed to the power are: Woolsey's Introduction to the Study of International Law, section 103, p. 161. Opinions of Mr. Justice Field in *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 United States Reports, at pages 540, 541; and in *Geofroy* v. *Riggs*, 133 *ib*, at page 267.

As has been pointed out in note 4, Mr. Justice White denies the power of the Federal Government to cede any territory of the United States, but he does not take this position because of any reserved right in the States.

It has been often asserted that Webster was of the opinion that the Federal Government could not cede the territory of a State without its consent. When questions arose over the northeastern boundary in Maine between Great Britain and the United States, the Federal Government asked Maine and Massachusetts to appoint commissioners to co-operate with the Federal Government, expressly stating that no treaty would be submitted to the Senate unless it receive the unanimous approval of the State Commissioners. Webster, at the time Secretary of State, wrote the letters directed to the Governors of Maine and Massachusetts, inviting them to appoint Commissioners. In these letters he states that it is the duty of the Federal Government not to take action without the consent of the two states whose rights are more immediately concerned. But the legal duty of the Federal Government and the legal right of the States are not discussed by Webster. In view of the then existing relations between the administration and the Senate, it was important to secure the co-operation of those states likely to be affected by the proposed boundary Treaty, before actually negotiating such a treaty, if the Treaty when negotiated was to receive the necessary two-thirds vote in the Senate.

The letters referred to will be found in Webster's Works, vol. VI, pages 272, 273. See also Webster's defence of the Treaty, *ib.*, vol. V, page 98.

Federal State owes its origin to this desire for protection from foreign aggression on the part of the individual states, plus a desire for untrammelled interstate intercourse. Thus in a Federal State, the necessity for presenting a united front to foreign nations, while not the sole, is a prime cause of the very existence of the State itself.

The separate states of our union, for instance, could not exist as separate nations. The weaker would become the prey to the stronger, the strongest would be open to foreign insult and aggression. This is true to-day; it was true at the time of the adoption of the Constitution. The people of South Carolina by entering the union, or the people of California by being in the union, are much more likely to be effectually protected from foreign invasion or personal insult in their dealings with foreigners, than if these states were sovereign and independent.

Protection from foreign aggression, therefore, was one of the principle causes which led to the formation of our union. And it has been asked: Is there not from this fact an implied reservation on any power granted to the Federal Government that it shall not be so used as to destroy one of the very purposes for which the State consented to join the Union? Others go further, and say that as the regulation of a state's internal affairs by the Federal Government was evidently not one of the objects of the Union, any power granted to the Federal Government cannot be so exercised as to regulate what is rather indefinitely called the "reserved police rights of the States."[6] It is assumed that carefully limited

[6]The idea that the treaty-making power or any power delegated to the United States cannot be exercised so as to regulate that which the States may regulate under their reserved power was of course often expressed in the *ante bellum* period. See opinion of Mr. Justice Daniel in the License Cases, 5 Howard's Reports, 504 (1847) at page 613; the dissenting opinion of Chief Justice Taney in the Passenger Cases, 7 Howard's Reports, 283, (1849) at pages 465, 466. These opinions reflect the ideas of Calhoun. See Calhoun's Works, edited by Crallé, vol. 1, pages 454, 455. In our own day Mr. John Randolph Tucker has expressed somewhat similar views. See Tucker on the Constitution of the United States, vol. 2, section 354. These views are directly contrary to the opinion of Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheaton's Reports, 1, (1824) at page 204, and are opposed to the current of modern authority.

legislative power and largely unlimited treaty-making power in the same government is an absurdity.

That our Constitution should carefully guard and limit the legislative power of the Federal Government is most natural. The regulation of interstate, not state commerce; protection to the United States as a nation, not regulations of the internal affairs of the States, are objects of the union. General legislative power in the Federal Government was unnecessary to accomplish the ends in view. But the power to deal with foreign nations as a unit; to secure as a unit in time of peace the best commercial treaties possible; as a unit to make war, if war was necessary; and as a unit to make the best peace possible, if peace was necessary; all these were prime objects of the union, and they are objects which cannot be obtained by conferring a treaty-making power limited and fettered in the way it was both wise and feasible that the Federal legislative power should be fettered. Take even the power to part by treaty with the territory of a State. The probability that the new nation would sooner or later be engaged in war was present to the minds of those who adopted our Constitution. Wars are ended by treaties of peace. The spectacle of a nation being obliged to purchase peace by the cession of territory is not rare. Before, as well as since, the adoption of our Constitution, other nations have often had to purchase peace by the cession of territory. Germany demanded Alsace and Lorraine as the price of withdrawing their troops from Paris. The experience of France is not unique. Though we are now a powerful nation removed probably for many decades to come from the fear of foreign invasion, we have in the course of our short history seen a foreign power in possession of our national capitol. If by entering a union with other States, a State renders it legally possible for the Central Government to sacrifice her territory or her complete control over her police arrangements to protect the territory of other States, she also gains the reciprocal advantage of being able to save herself and the great majority of the other

States by sacrificing the territory of a sister State. Such an arrangement is not one-sided.

Take the specific case under consideration. The power to admit or exclude aliens from the territory of a State unquestionably resides in our Federal Government. The Federal Government has the exclusive power of naturalization. When the States have already given to the Central Government the power to admit aliens and make them citizens, entitled to all the rights and privileges of citizenship, there is nothing unreasonable in their also conferring on that government the power to give aliens, after admission to a State and before naturalization, the right to be admitted to her public schools.

To allow a bare majority of the Federal Legislature to make a treaty which might have these results would have been unwise. Our Constitution has, therefore, required that at least two thirds of the Senate present shall be required to ratify a treaty. The Senate is that body which primarily represents the States. Such a provision has proved by experience an ample protection against the unwarranted sacrifice by treaty of the interest of any one State. To have required the unanimous consent of the Senate would have rendered it practically impossible for any treaty to be negotiated.

The fact that we are a Federal State, that we have only conferred on our Federal Government limited legislative power, that the cession of territory or the regulation of the internal affairs of the States was not an object for which our union was formed, or for which it exists, does not lead to the conclusion that the treaty-making power is impliedly limited by a rule which would prevent either the cession of the territory of a State to a foreign power, or an interference by treaty with the police powers of the States. On the contrary, to impose implied limits of this kind would seriously interfere with one of the great objects of the union—the capacity to deal as one people with foreign nations.

It is, of course, admitted that the mere fact that the power claimed to exist in our Federal Government is

necessary to accomplish a principal object of the Union, is not a reason why we should assume that it has been conferred. But where a power, as the treaty-making power, has been in general terms conferred on the Federal Government, to limit the power, not by any words in the Constitution but by a limitation implied from the supposed nature of our Federal State, it is necessary to show affirmatively that the limitation proposed arises from the very nature of the State itself. If this cannot be done, but on the contrary an examination of the forces creating our Federal State show that one of the prime objects of our union would be defeated by the proposed implied reservation, no such reservation may be implied.

If these conclusions are correct, our Federal Government has under the Constitution power to make a treaty with Japan or any other foreign nation, giving to the subjects or citizens of the foreign nation residing in one of the States the right to attend the public schools of the State on the same terms as native or naturalized citizens. In the Constitution itself we find nothing to restrain the President from negotiating, and two thirds of the Senate from ratifying such a treaty. It is not opposed to the fundamental characteristics of free republican government; it does not interfere with the liberty of the citizens of the United States; and finally, there is nothing in the nature of our Federal State from which we may imply any limitation on the treaty-making power not found in the words of the Constitution. Whether we have actually made such a treaty with Japan is another question. Whether, admitting that we have made such a treaty, it was a proper or wise treaty to make is foreign to this discussion.

A power may be abused by those who possess it, but this in itself is no reason for denying the existence of the power. The confusion which has existed on the subject of the treaty-making power in our Constitution has arisen largely through confusing the letter of the Constitution with the spirit which should animate those respon-

sible for the conduct of our State and Federal Governments. There are many acts which our Federal or State Governments may constitutionally do which would unquestionably violate the spirit of the agreement which makes us a nation. If the Federal Government should arbitrarily barter away the territory of a State without its consent, no one doubts that the State affected would be morally justified in resisting the transfer by force. But the possible arbitrary exercise of a power while it may morally justify revolution, does not prove, or even tend to show, that the power does not exist. There is no proposition of our Constitutional law more firmly established than this: Given a power in a Department of the Federal Government, and that Department, not the court, is the sole judge of the conditions under which the power should be exercised. If by treaty we have not power to adjust the boundary between the United States and a foreign state, without the consent of the particular State whose territory is affected, the possibility of warding off a war by such an adjustment would not legally justify making such a treaty without the concurrence of the State. The recklessly selfish attitude of the particular State involved would be no legal defense for such a treaty. On the other hand, if the power exists, the President and Senate are the sole judges of the time and manner in which it may be exercised.

There is a letter of the Constitution and a spirit of the Constitution. The Courts have always recognized that their concern is with the Constitution as written. If this rule was broken and our judges permitted themselves to wander into the uncertain realm of the spirit of the Constitution we would soon have acts and treaties set aside by Courts because the judges believed their provisions were unnecessary.

The spirit of our Constitution is plain. It is that in the exercise of what may be an undoubted power, the members of the Federal or State Governments should remember that the whole should as far as possible avoid injuring a part, and that the part should as far as may be

avoid injuring the whole. The cultivation of such a spirit is essential to our preservation as a Federal State. But whether it is or is not violated by a particular act or treaty is for the body which passes the one, or for the President and Senate which negotiates and confirms the other, alone to decide.

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